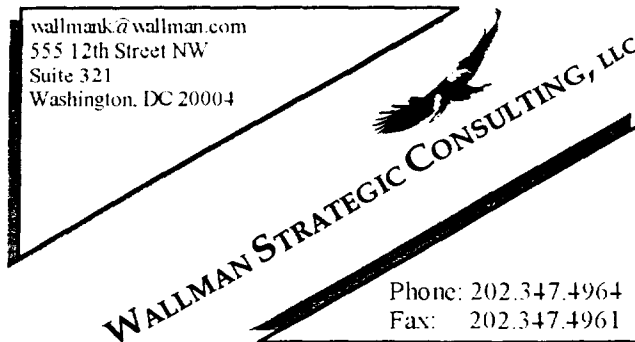


Ex parte communication (original)

Docket #

MM 93-25 ✓

EX PARTE OR LATE FILED



Kathleen M.H. Wallman

October 8, 1998

Regina Keeney  
Chief, International Bureau  
Federal Communications Commission  
2000 M Street, NW  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: In the Matter of: Implementation of Section 25 of the Cable  
Television Consumer Protection and Competition Act of 1992  
MM Docket 92-25 ✓

Dear Ms. Keeney:

As the Commission moves toward implementing section 25 of the Cable Television Consumer Protection and Competition Act of 1992, the public interest responsibilities of direct broadcast satellite (DBS) providers that use the valuable public resource, the radio/broadcast spectrum, representatives of ResearchTV<sup>1</sup> have considered the issues raised with you and the staff of the International Bureau when we met on September 14, 1998.

In our meeting and in its comments, representatives of ResearchTV stressed the importance of Commission rules that ensure adherence to section 25(b)(3)'s requirement that the DBS provider exercise no editorial control over the content of the public interest programming. Proposals that leave programming decisions entirely to the discretion of DBS providers are not consistent with section 25(b)(3), and ResearchTV urges the Commission to reject proposals that would allow the DBS provider sole discretion to select the programmer. Discretion to select the programming source is effectively selecting the programming and the decisions may be biased by the financial interests of the DBS provider. Such a process will operate to deter new

<sup>1</sup> ResearchTV is a group of accredited research universities that promote and provide access to research education through video based technologies. Coordinated by the University of Washington, its founding members include Duke University, Princeton University, Stanford University, the University of Alaska-Fairbanks, the University of California at Los Angeles, the University of California at San Diego, the University of Hawaii, the University of Pennsylvania, the University of Texas at Austin, and the University of Virginia.

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programmers and programming, particularly those who have historically been unable to obtain access.

Other commenters in the proceeding have noted that editorial control encompasses the ability to select programmers, reject programming, remove programming or determine what hours programming will be broadcast. Court interpretations of identical language contained in section 10 of the 1992 Cable Act addressing a cable operator's carriage of public educational, and governmental ("PEG") access channel affirms this position.<sup>2</sup>

ResearchTV believes that there must be a decision making process that is fair, reasonable, and promotes the purposes of section 25 and insulates the DBS provider from exercising any editorial control over public interest programming content. The structure by which programmers are selected should not be inflexible, should not be encumbered by a large number of detailed rules, should not mandate either numerous or burdensome reporting requirements, nor ignore that the effort of promoting public interest programming will not succeed unless the DBS provider, whose investment built the system in the first place, willingly provides logistic assistance to the effort. ResearchTV believes that the Commission's rules should commit to the DBS provider, under clearly established standards, the responsibility to create a mechanism that provides for the selection of programmers and programming, and the range of other matters involved, all independent of the DBS provider. ResearchTV believes that it is important that if the programming envisioned by the law is to have an audience, there should be an entity, appointed by each DBS provider, that is accountable for selecting and administering the public interest programming of section 25.

ResearchTV recommends that the Commission's rules require a DBS provider, within 180 days of the effective date of the Commission's Order in this proceeding, to establish a mechanism that isolates it from editorial control of programming but initiates a structure that will be responsible for carrying out the goals of section 25. Under the Commission's rules each DBS provider will be responsible for establishing an entity that will implement and administer its public interest programming. ResearchTV believes such a structure will provide an incentive, if not competition, for DBS providers to pursue the best possible public interest programming. The result will not only implement the intent of section 25, but enhance the competitive environment in the video programming market overall.

Specifically, the Commission should require DBS providers to appoint a panel of individuals who will carry out the provisions of section 25. The panel should be comprised of a reasonable number of individuals so decisions regarding programming can be made efficiently and effectively consistent with the law and the Commission's regulations. Consistent with the statute, one-third of the members would represent noncommercial providers of informational programming and one-third would represent accredited educational institutions that provide educational programming. Overall, there should be particular effort to appoint individuals affiliated with programming providers who have a nonprofit character, that receive federal funding related to the programming, are an accredited educational institution, and/or have the capability to provide, through technological or other development, advice as to how DBS providers can furnish programming that reflects the principle of localism. Particular effort should be made to ensure representation of interests that historically have not had access to programming opportunities.

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<sup>2</sup> The comments and *ex parte* presentation of the Media Access Project, on behalf of DAETC, *et al.*, are particularly insightful, addressing both the legal requirements of section 25 and the purposes of fulfilling the public interest requirements of those using the radio/broadcast spectrum. See Comments of DAETC, *et al.*, dated April 27, 1997 and *Ex parte* submission of the Media Access Project, dated August 27, 1998, in MM Docket 92-25.

The Commission's regulations should require that the panel elect a chair and that decisions be made on a majority basis. The panel should decide issues relating to the provision of public interest programming and programmers. The DBS provider may designate an individual to represent it and provide information at panel meetings, but that individual should have no vote in the panel deliberations.

The Commission's challenge in balancing the interests at stake is a difficult one. In this proceeding, it must weigh the need to ensure adherence to the letter and spirit of the law, while ensuring that the structure imposed does not create a burdensome regulatory process that will deter the delivery of high quality, varied and new public interest programming that is the very purpose of section 25. ResearchTV believes it important that a structure imposing a responsibility on the DBS provider to establish an independent panel to implement and administer its public interest programming, while using the substantive direction of section 25 as criteria for the qualifications of the entity's membership, will best serve the purpose of the law. The type and quality of public interest programming can contribute significantly to enhancing competition in the video distribution market. ResearchTV believes that committing such responsibility to a DBS provider gives it a substantial stake in choosing qualified and motivated individuals to fulfill the law's purpose, while at the same time isolating the DBS provider from any editorial control over the programmers or programming.

A proposed regulation implementing ResearchTV's position is enclosed.

In its decision implementing section 25, the Commission has an opportunity to broaden substantially the access of interests that historically have had little or no opportunity to provide programming, while at the same time affording much broader segments of the American public with wider choice. ResearchTV appreciates very much the consideration the Commission has given its views and urges action consistent with its positions.

Sincerely,

Kathleen M. H. Wallman

Enclosure  
Copy list attached

**Copies Provided to:**

**The Honorable William E. Kennard  
Chairman**

**The Honorable Susan Ness  
Commissioner**

**The Honor Michael Powell  
Commissioner**

**The Honorable Harold Furchtgott-Roth  
Commissioner**

**The Honorable Gloria Tristani  
Commissioner**

**Magalie Roman-Salas  
Secretary**

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**Susan L. Fox  
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Commissioner Powell**

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**Deborah Lathen  
Chief, Cable Services Bureau**

**William Johnson  
Deputy Chief, Cable Service Bureau**

**Meryl Jcove  
Associate Chief, Cable Services Bureau**

## **PROPOSED REGULATIONS- DBS SELECTION OF PUBLIC INTEREST PROGRAMMERS AND PROGRAMMING**

- I. Not later than 180 days after the effective date of these rules, each Direct Broadcast Satellite provider shall establish a fair and reasonable process, free of its editorial control, to determine and administer the public interest programming required by section 25.
- II. Each Direct Broadcast Satellite provider shall appoint a panel of individuals whose responsibility will be to administer a program that fulfills the public interest responsibilities of section 25.
  - A. The Direct Broadcast Satellite provider shall appoint individuals to the panel consistent with the following:
    1. The panel shall be comprised of a reasonable number of individuals that will allow decisions to be made efficiently and effectively consistent with the law.
    2. One third of its members shall represent noncommercial providers of informational programming and one third shall represent accredited educational institutions. Overall, the panel should be comprised of individuals that represent programming of a nonprofit nature, that receive federal funding, or have the ability to provide, through technological or other development, advice as to how providers can furnish programming that reflects the principle of localism in direct broadcast satellite programming.
    3. The panel shall choose a Chair to preside over the panel's deliberations and decisions.
    4. Decisions by the panel shall be made by majority vote.
    5. The Direct Broadcast Satellite provider may appoint an individual to attend the meetings of the panel for purposes of providing information and support to the panel, but that individual shall have no standing to vote.
- III. The panel shall decide issues relating to the selection of programming and programmers under section 25 and matters relating to the implementation and administration of section 25. In making its decisions, the panel shall be guided by the substantive provisions and purposes of the section 25 and the Commission's regulations.
- IV. Prior to appointing an individual or individuals to its panel, a Direct Broadcast Satellite provider must give notice of its intention to establish a panel in a manner likely to come to the attention of individuals who are knowledgeable of the public interest programming under section 25. The Direct Broadcast Satellite provider shall provide sufficient information to advise interested individuals of the qualifications to serve on the panel, the responsibilities of the panel, the term of appointment, how to apply to be a member of the panel and such other information that explains the Direct Broadcast Satellite providers' process to ensure public interest programming.
- V. Any person who believes a Direct Broadcast Satellite provider has not properly established a panel consistent with this section or has exercised editorial control over programming in violation of section 25, may file a complaint with the Commission. The complaint shall state with specificity the conduct of the Direct Broadcast provider that is alleged to have violated section 25 and the Commission's rules.